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# In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 195.....

WILLIAM J. SOEDER and  
EDWARD A. SOEDER,  
*Petitioners,*

VS.

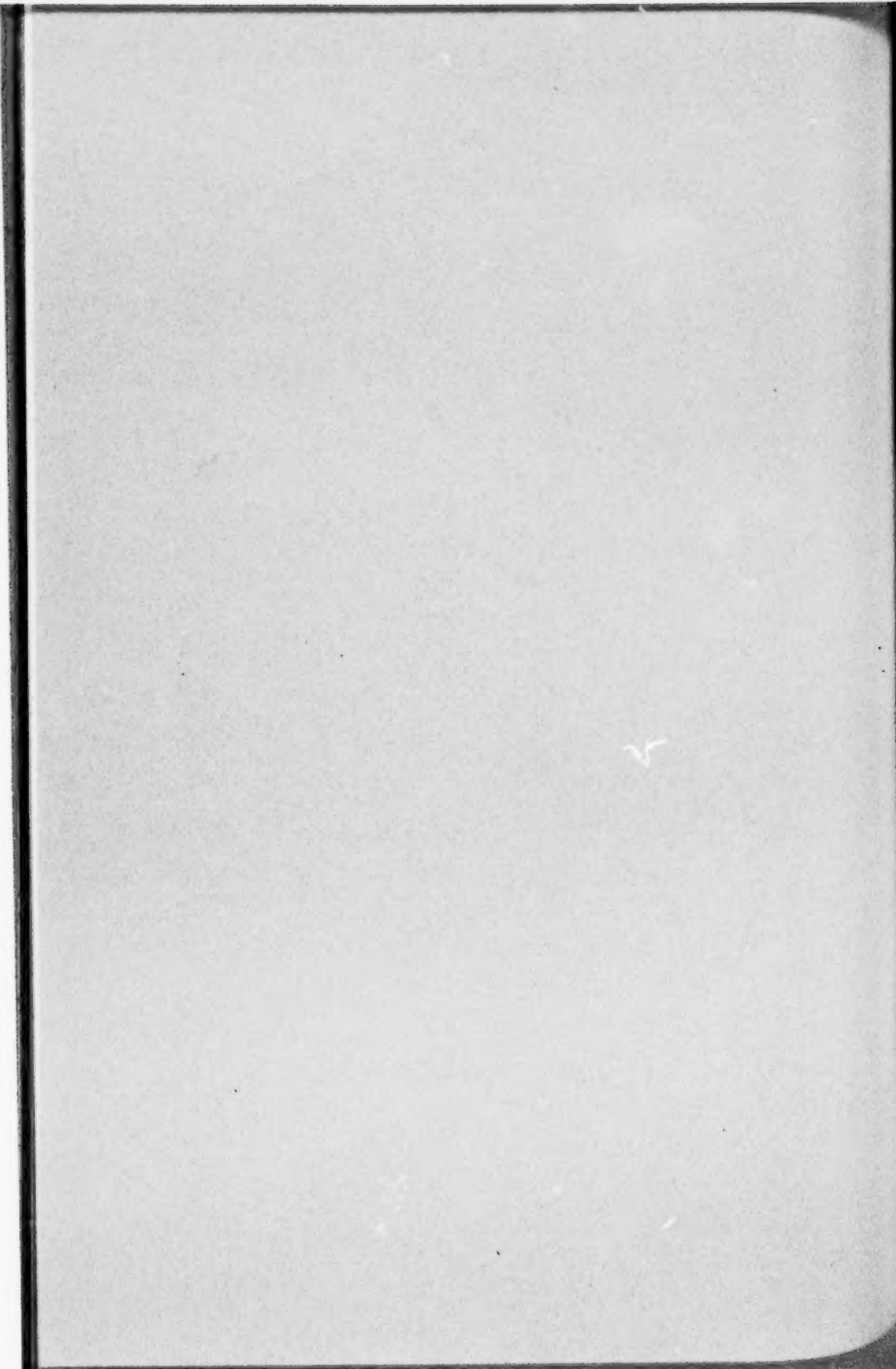
THE UNITED STATES OF AMERICA,  
*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI**  
**To the United States Circuit Court of Appeals**  
**For the Sixth Circuit, and**  
**BRIEF IN SUPPORT OF PETITION.**

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vs.

THE UNITED STATES OF AMERICA,

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## **PETITION FOR WRIT OF CERTIORARI To the United States Circuit Court of Appeals For the Sixth Circuit.**

Your petitioners respectfully pray for a writ of Certiorari to review the decision of the United States Circuit Court of Appeals for the Sixth Circuit in the above case.

The petitioners seek a review of the judgment of the United States Circuit Court of Appeals for the Sixth Circuit which affirmed a conviction by a jury in the District Court of the Northern District of Ohio at Cleveland, and a sentence that each of the petitioners serve in a penal institution for one year and one day and pay a fine of \$5,000.00 and the costs of the Court.

### **CHARGES IN THE INDICTMENT.**

The indictment charged in Counts one and two that the Corporation, during the calendar year of 1936, derived and received a net income from business in the sum of \$36,276.17, upon which net income the Corporation income and excess profits taxes of \$12,461.67 were due, but that

the Corporation filed an income tax return for said year showing a net loss of \$3,457.91, and paid no income or excess profits taxes; and that Edward A. and William J. Soeder, President and Secretary-Treasurer, respectively, of the Soeder Sons Milk Company, procured, counselled and advised the preparation and presentation of a false and fraudulent return (Count one), and (Count two) attempted to defeat and evade the income and excess profits taxes upon the net income of the Corporation for said year.

The indictment further charged in Counts three and four that the corporation, during the calendar year of 1937, derived and received a net income from business in the sum of \$9,732.27, upon which net income the corporation income and excess profits taxes of \$2,004.90 were due, but that the corporation filed an income tax return for said year showing a net loss of \$2,241.96, and paid no income or excess profits taxes; and that Edward A. and William J. Soeder, President and Secretary-Treasurer, respectively, of the Soeder Sons Milk Company, procured, counselled and advised the preparation and presentation of a false and fraudulent return (Count three), and (Count four) attempted to defeat and evade the income and excess profits taxes upon the net income of the Corporation for said year.

### **THE STATUTES INVOLVED.**

The pertinent sections of the U. S. Code with reference to these laws are Title 26, Section 3793(b)(1) that,

“any person who wilfully aids or assists in, or procures, counsels or advises the preparation or presentation under, or in connection with any matter arising under the internal revenue laws, or a false or fraudulent return, shall be guilty of a felony,”

and upon conviction thereof be punished accordingly; and Title 26, Section 145 (b) that

“any person \* \* \* who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter, or

the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony,"

and upon conviction thereof be punished accordingly.

Title 26, Section 52, of the United States Code, provides that,

"every corporation subject to taxation under this chapter shall make a return stating specifically the items of its gross income and the deductions and credits allowed by this chapter, and such other information for the purposes of carrying out the provisions of this chapter as the Commissioner, with the approval of the secretary, may by regulations prescribe. The return shall be sworn to by the president, vice-president or other principal officer, and by the treasurer, assistant treasurer or chief accounting officer."

#### **SUMMARY OF THE MATTER INVOLVED.**

The Petitioners are brothers engaged in the wholesale milk business in Cleveland for many years, and at all times mentioned they were the sole owners and operators of a dairy business under the name of **The Soeder Sons Milk Company**, which business was not incorporated.

They were charged in a four count indictment with being officers of "**The Soeder Sons Milk Company**, a Corporation duly organized and existing under and by virtue of the laws of the State of Ohio," owing a duty to file excess profits and income tax returns for such Corporation, and that, as such officers, they did not file a true return and attempted to evade and defeat a tax due the Government.

The Prosecution's claim was that the entries in the alleged corporation's books were improper, because they did not include all receipts and because some entries were made to appear as loans to the business from these Petitioners when, in fact, it should have been entered as income for income tax purposes, thereby evading the payment of taxes due the Government.

The Petitioners established, by testimony, that out of their own funds they gave secret rebates in excess of thirty five thousand dollars, and that during the bank holiday they advanced sums in excess of \$43,000.00, making a total of nearly \$80,000.00; that because they were compelled to give secret rebates to their customers to meet the competition of the trade at that time, and because of the existence of a State law known as "The Burk-Herner Act," which prohibited the giving of rebates and discounts, they therefore, did not enter these rebates on their books for deduction purposes, but instead credited themselves with various sums from the receipts of the business and entered such credits to themselves as loans from them to the business. The evidence showed that they did so in order to pay themselves back for the monies they advanced for these secret rebates and the testimony is that their accounts balanced and that there was no money due to the Government for taxes. The evidence further shows that many of their customers testified to having received these secret rebates from these Petitioners and showed where they had entered them on their books and paid income tax thereon to the Government. Although the Prosecution admitted that rebates were given, they disallowed them because the taxpayer did not "put it on the books" and they would not take the trouble to investigate the customers' books although they did examine such books for other purposes. This of course made the entries appearing in the books as credits entirely without foundation and they called it fraud.

Although the Indictment alleged that **The Soeder Sons Milk Company** was a corporation duly organized and existing by virtue of the laws of the State of Ohio, the fact is that there never was such a corporation organized and existing under the laws of Ohio, and that not only did the Prosecution fail to prove the existence of such a corporation, but the Defense proved the non-existence of such corporation. All that the Prosecution established which might



go to show the existence of a corporation was that the income tax returns were filed as a corporation; the bank account which was in the name of **The Soeder Sons Milk Company**, and the checks signed by these Petitioners as officers; also the sales slips and vouchers to customers. Nothing more.

The Petitioners established that the reason they filed as a corporation was because the Internal Revenue Office at Cleveland insisted that they do so. This was about seven years before the return of this Indictment and came about when the bookkeeper of **The Soeder Sons Milk Company** informed the Internal Revenue office that the business was not a corporation, but was owned by these two brothers as partners and showed a letter received from the Secretary of State of the State of Ohio, of the Franchise Tax Division, which letter stated that the State does not recognize **The Soeder Sons Milk Company** as a corporation and returned a check which had been sent for franchise tax to the State. Further testimony was that the business was conducted as a family affair and that there was a continuous commingling of funds.

When the Prosecution rested, counsel for Petitioners moved for a directed verdict, one of the grounds being that the Government failed to prove a material allegation in the Indictment, to-wit: That these Petitioners were officers of a corporation duly organized and existing under and by virtue of the laws of the State of Ohio. Before ruling on this Motion, the Court permitted the Prosecution to reopen its case and then the Prosecution introduced into the evidence, over the objection of these Petitioners, a certified copy of a charter styled "*The Soeder Sons Company*," which charter had been twice issued and twice canceled. The last cancellation being sixteen years before the Indictment. Although the name appearing in the Indictment, **The Soeder Sons Milk Company**, was entirely different from the name appearing on this copy of the charter for *The*

*Soeder Sons Company*, the Court nevertheless admitted it into the evidence and it remained in the case without a scintilla of proof that *The Soeder Sons Company* is the same as **The Soeder Sons Milk Company**.

The Prosecution then again rested its case.

Petitioners claimed that material variance and asked that it be stricken, but were overruled.

Petitioners then requested special instructions in the Charge to the Jury, submitting this question to the Jury as to the corporate existence of **The Soeder Sons Milk Company**. Special requests were denied. The requests denied in this connection are discussed in the Brief herein and are identified as Assignments of Error Nos. 1 and 3, also 15 and 23. Special exception to the charge with request that the question of corporate existence be submitted to the jury were then made and overruled. The question of rebates as discussed in the Brief herein under Assignments of Error Nos. 20 and 21 we claim is the most important legal question herein. In the lower Court the prosecution admitted that rebates were given, but contended that same were not deductible because they were given in violation of a State law, the Burk-Herner Act, and were therefore contrary to public policy. The Circuit Court of Appeals left this question unanswered.

The Circuit Court also ignored requests for rulings on Assignments of Error Nos. 19 and 24 which we claim were charges that the Court should have given to the jury.

### **JURISDICTION.**

The jurisdiction of this Court is involved under Title 28 U. S. C. Section 347 (a) of the Judicial Code as amended March 3, 1911, February 13, 1925, January 31, 1928 and June 7, 1934.

The verdict was affirmed on April 20th, 1944. Re-hearing thereon was denied May 22, 1944, and the time for filing the petition for certiorari expires on the 27th day of June, 1944.

## REASONS FOR GRANTING THE WRIT.

Although counsel for Petitioners in Brief and argument in the Circuit Court of Appeals contended that **The Soeder Sons Milk Company** was not a corporation, and that there was no evidence at all introduced that the Petitioners were operating their business as a corporation, and, in spite of the testimony in the record to the effect that the State of Ohio had refused to recognize the Petitioners' business as a corporation, and that there were no stock Certificates issued; no Board of Directors; no arrangements for continuity of business after death; no limitations of liability, the Court of Appeals nevertheless held that they conducted their business as a corporation or association taxable as a Corporation within the meaning of Revenue Act of 1936.

The Court of Appeals in its judgment entered on April 20, 1944, decided that the principal grievance of the Appellants was failure of proof to show the legal existence of the corporation under the laws of Ohio, but because the returns were filed as the returns of a corporation and that the business had been conducted as a corporate business, and a corporation being defined in the applicable statute of the Revenue Act of 1936 in Section 1001 (a) (2) thereof with such breadth as to include within its ambit *de facto* corporations and associations, the Court, therefore, held that there was no error in the instruction of the Court that the alleged acts were on behalf of the corporation without submission to the jury of a question of fact in respect to its legal existence, and finding no other substantial errors in the record, it is ordered that the judgments below be and they are hereby affirmed.

Petitioners say that such holding is contrary to the holding of the United States Supreme Court.

Petitioners aver that by such holding the Circuit Court of Appeals is deciding an important question of general law in a way probably untenable and in conflict with the

weight of authority, and that such holding is probably in conflict with applicable decisions of the Supreme Court.

In view of the Prosecution's failure to prove the corporate existence and the Defense proof that there was no such corporation chartered it conclusively established that there was no *de jure* corporation; then the Prosecution's failure to prove that the business was conducted as that of a corporation or association taxable as a corporation in line with the holdings of the United States Supreme Court and failure to prove that the State of Ohio ever recognized The Soeder Sons Milk Company as a corporation in any manner at all, then the claim of *de facto* corporation is untenable here because the facts and circumstances do not establish *de facto* existence and the Circuit Court was probably in error when it indicated that this was a *de facto* corporation or association within the Revenue Act.

Petitioners further say that such holding by the Circuit Court amounts to a departure from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision under Sections 237 (b) and 240 (a) of the Judicial Code as amended on February 13, 1925.

The Circuit Court failed to mention the important question of Rebates given as signified by Assignments of Error 20 and 21 which is set forth on pages 52 and 53 of Vol. I, in the Transcript of Record. This question is, in the opinion of counsel, the most important in the case and the legality of these rebates and their deductibility is the crux of the entire case bearing on the question of wilfulness and fraud.

The question of material variance because of the introduction of a charter of *The Soeder Sons Company* which was claimed to be the same as **The Soeder Sons Milk Company** was entirely omitted by the Circuit Court, al-

though counsel stressed both in Brief and Argument the timely objection to such introduction, and the importance that if such exhibit be admitted at all, that it be submitted to the Jury to decide whether *The Soeder Sons Company* is the same as **The Soeder Sons Milk Company** as per Assignment of Error No. 2, pages 35 and 36 of Transcript of Record.

Petitioners say that in the rulings and judgments made by the lower courts that the courts erred to the prejudice of the petitioners.

Wherefore, your petitioners pray for allowance of a writ of certiorari from the United States Court of Appeals for the Sixth Circuit to the Supreme Court of the United States and the judges thereof to the end that the record in this case may be removed into the Supreme Court of the United States and the errors complained of by your petitioners may be examined and corrected and said judgment reversed and set aside and judgment rendered for petitioners.

EDWARD A. SOEDER,

WILLIAM J. SOEDER,

By HENRY C. LAVINE and

H. W. KISER,

*Their Attorneys.*